ESTATE OF HENRY FRANK RACINE

IBIA 84-9 Decided January 7, 1985

Appeal from order denying petition for rehearing issued by Administrative Law Judge Keith L. Burrowes in IP BI 540C 81.

Reversed.

1. Indian Probate: Marriage: Generally

The Board of Indian Appeals follows the rule that the marital status of an individual is determined by the laws of the jurisdiction in which the relationship was created.

2. Indian Probate: Marriage: Common Law

In order to establish a common-law marriage in the State of Montana, there must be mutual consent for parties to be presently married.

APPEARANCES: James P. Reynolds, Esq., Helena, Montana, for appellants; Marny E. Corbin, Esq., Browning, Montana, and Steven L. Bunch, Esq., Helena, Montana, for appellee; Philip E. Roy, Esq., Browning, Montana, for amicus curiae. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

On December 15, 1983, the Board of Indian Appeals (Board) received a notice of appeal from appellants Martha Alfreda Racine Crawford, Henry Nelson Racine, Donald Juan Racine, Feral Barbara Racine Wagner, Nettie Louise Racine Harrison, Eleanore Bess Racine Monroe, Arlene Mary Racine Sinclair, Carol Ann Racine Pepion, Bonnie Jean Racine Dunn, Theresa Marie Wilson Monroe, Coleen Fawn Wilson Gray, Scott William Wilson, Troy Delbert Wilson, and Julie Ann Wilson. Appellants sought review of an October 11, 1983, order denying rehearing issued by Administrative Law Judge Keith L. Burrowes. This order let stand an August 1, 1983, order issued by Administrative Law Judge Garry V. Fisher determining the heirs of Henry Frank Racine (decedent). For the reasons discussed below, the Board reverses this decision.

Background

Decedent, Blackfeet Allottee 520, was born March 12, 1901, and died intestate on April 18, 1974, at the age of 73. A hearing to ascertain decedent's heirs was held on December 15, 1976, before Administrative Law Judge Frances C. Elge. In an order dated December 22, 1976, Judge Elge found that decedent's heirs were the 14 appellants in the present case, and Elizabeth Ackakinow (Akino) Galbavy Belgard Racine (appellee), Darryl Henry Racine, Dianne Pearl Racine, and Harlan Eugene Racine. Appellants are the children and grandchildren of decedent and his wife, Victoria Damon. Appellee was found to be decedent's common-law wife. The remaining three named heirs are the children of decedent and appellee.

Present appellants petitioned for rehearing. Because Judge Elge had retired, the petition was considered and, on May 13, 1977, was denied by her successor, Administrative Law Judge David J. McKee. On appeal to the Board, the decisions below were affirmed. Estate of Henry Frank Racine, 7 IBIA 1 (1978).

Appellants sought review of this decision in Federal court. The United States District Court for the District of Montana granted the Secretary's motion to dismiss the proceeding on the grounds that it lacked jurisdiction to hear the appeal under 25 U.S.C. § 372 (1976). Crawford v. Andrus, No. CV-78-8-GF (D. Mont. July 13, 1979). On further appeal, the Ninth Circuit Court of Appeals, without discussion, reversed the district court and remanded the matter for further proceedings. Crawford v. Andrus, No. 80-3091 (9th Cir. Oct. 30, 1980). Upon joint motion of the parties, the district court remanded the matter to the Department for a hearing de novo. Crawford v. Andrus, No. CV-78-8-GF (D. Mont. Feb. 24, 1981). The case was assigned to Judge Fisher for the hearing de novo.

Judge Fisher held two hearings in this case on August 26, 1981, and November 5, 1981. Testimony at the hearings revealed that decedent and appellee began living together in 1948. At that time, decedent was divorced from his first wife, appellants' mother. Appellee had filed for divorce from her second husband, but the case was dismissed without a divorce being granted. Appellee stated that she believed she was divorced. Although appellee testified that she considered herself married to decedent from the time they began living together in 1948 (Tr. 29), she also said that she intended to marry decedent until she learned how many children he had, and then she backed out (Tr. 44). She stated that she lived with him because she had no choice because she was already pregnant (Tr. 44). When asked if she and decedent later agreed to be married, she said that it was not discussed until after decedent began getting ill in 1961, and then something always came up so that they did not get married (Tr. 45). Decedent and appellee had five children, three of whom survived infancy. These five children were born between 1950 and 1957.

The appellants testified that decedent told them he was not living with appellee (Tr. 203, 235), that appellee herself said they were not living together as husband and wife (Tr. 162, 163, 184, 203, 209), that decedent lived with them and his ex-wife for extended periods of time (Tr. 153, 155, 166, 180, 204, 208, 215, 241), that appellee did not stay with decedent

while he was living with them (Tr. 155, 180, 204, 215), that several of his daughters and his ex-wife regularly did laundry and household chores for decedent (Tr. 162-63, 180, 233), and that appellee was not with decedent at his ranch (Tr. 181-82, 205, 217, 232). Appellee made no attempt to rebut this testimony.

Appellee's husband died on March 30, 1966. From that time appellee was legally capable of entering into another marriage.

Appellants allege that after November 20, 1967, an ordinance passed by the Blackfeet Tribal Business Council prohibited common-law marriage. They, therefore, asserted that any common-law marriage would have to have been entered into between March 30, 1966, and November 20, 1967.

In his August 1, 1983, order determining decedent's heirs, Judge Fisher found that appellee was decedent's common-law wife. Judge Fisher found that appellee was legally competent to enter into a common-law marriage after March 30, 1966, and that her relationship with decedent continued essentially unchanged from 1948 to decedent's death. An appeal from this order was taken to the Board, which dismissed the appeal as premature. Estate of Henry Frank Racine, 12 IBIA 8 (1983). The appellants sought rehearing before the Administrative Law Judge. Because Judge Fisher had retired, the petition was considered by Judge Burrowes. Rehearing was denied on October 11, 1983. The present appeal was taken from the October 1983 order.

On appeal, briefs have been filed by both parties. The Blackfeet Tribe (amicus) sought and was granted amicus curiae status, and filed a brief.

Discussion and Conclusions

The only issue before the Board in this appeal is whether appellee was properly found to be decedent's common-law wife. This issue raises two preliminary questions: First, the choice of law; and second, the application of that law to the facts of this case.

In finding that decedent and appellee had entered into a common-law marriage, Judge Fisher applied the laws of the State of Montana. He made this choice of laws based upon his finding that the couple substantially resided in Cut Bank, Montana, a city lying immediately east of and adjacent to the Blackfeet Reservation. He found that because Cut Bank was not on the reservation, decedent and appellee were subject to the laws of Montana while living in that city.

[1] In Estate of Richard Doyle Two Bulls, 11 IBIA 77, 79-80 (1983), the Board noted that choice of law is frequently governed by considerations of comity rather than by hard and fast rules. See also 55 C.J.S. Marriage § 4(b)(2) (1948). As discussed in Two Bulls, the Board applies the general rule that marital status is determined by the laws of the jurisdiction in which the relationship was created. See also Estate of Wilma Florence First Youngman, 12 IBIA 219 (1984).

Judge Fisher found that a common-law marriage was established between decedent and appellee in the State of Montana while the two parties resided in that State. The record shows that appellee, a non-enrolled Indian, 1/ resided in various cities in Montana, primarily in Cut Bank and Browning. Browning is located on the Blackfeet Reservation. Cut Bank is not located on any Indian reservation and is under the jurisdiction of the State of Montana. At the hearing, appellee testified that she was attempting to find a place to rent in Cut Bank, because she preferred to live there (Tr. 10). The Board finds that, to the extent appellee has a domicile, it is the State of Montana.

Decedent, an enrolled Blackfeet Indian of the Blackfeet Reservation in Montana, owned a ranch on the reservation. From the time of his divorce from his first wife in 1947 until the early 1960's decedent lived on his ranch during the winters while trapping. The remainder of the year decedent sought and generally obtained work off the reservation. In the early 1960's decedent began herding cattle on the reservation during the summers, so that he lived at his ranch most of the year. In the late 1960's decedent lived off the reservation more frequently because of the severity of the winters (Tr. 29-36, 234). The Board finds that the reservation was his place of domicile, even though he often left the reservation in order to obtain employment and therefore resided in the State of Montana for substantial periods of time.

While on the reservation, decedent was subject to the laws enacted by the Blackfeet Tribe. At some time relevant to this matter, 2/ the Blackfeet Tribe passed an ordinance pursuant to 25 CFR 11.28 3/ prohibiting both Indian custom and common-law marriages. 4/ From the time of the approval of this

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1/ At one time, appellee was enrolled at the Rocky Boys Reservation in Montana.

2/ The parties argued that the Blackfeet Law and Order Code prohibited common-law marriage after its revision in 1976. Amicus states that the code has always prohibited such marriages. In support of this position, amicus presented copies of the code which it states were in effect before and after 1976. These copies of the code are not authenticated.

3/ Section 11.28 states in pertinent part:

"(a) The Tribal council shall have authority to determine whether Indian custom marriage and Indian custom divorce for members of the tribe shall be recognized in the future as lawful marriage and divorce upon the reservation, and if it shall be so recognized, to determine what shall constitute such marriage and divorce and whether action by the Court of Indian offenses shall be required."

4/ According to amicus' exhibits, Chapter 3 of its Law and Order Code concerns domestic relations. Section 1 of Chapter 3 states in its entirety: "All members of the Blackfeet Indian Tribe shall hereafter be governed by State Law and subject to State jurisdiction with respect to marriage hereafter consummated. Common law marriages and Indian custom marriages shall not be recognized within the Blackfeet Reservation."

ordinance decedent could not establish a common-law marriage on the reservation. 5/ The parties have not suggested that the Blackfeet code attempted to invalidate common-law marriages entered into by its domiciliaries in another jurisdiction where such marriages were valid. 6/ Therefore, the Board finds that decedent was not legally disabled from entering into a common-law marriage in a jurisdiction that recognized common-law marriage.

While decedent was residing in the State of Montana he was subject to the laws of that jurisdiction. See, e.g., Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973); Puyallup Tribe v. Department of Game, 391 U.S. 392, 398 (1968); Ward v. Race Horse, 163 U.S. 504 (1896). Based upon the findings that decedent resided in the State of Montana with appellee for substantial periods of time and that he was subject to the laws of Montana at those times, Judge Fisher properly applied Montana law in determining whether decedent had established a common-law marriage to appellee.

The second question is whether the Judge correctly applied Montana law to the facts of this case. In Elliott v. Industrial Accident Board, 101 Mont. 246, 53 P.2d 451, 454 (1936), the Montana Supreme Court stated:

> The so-called "common-law marriage" is recognized as valid in this state, but, to be effective there must be the mutual consent of parties able to consent and competent to enter into a ceremonial marriage, and the assumption of such relationship, by consent and agreement, as of a time certain, followed by cohabitation and repute.

This statement was repeated with approval in Stevens v. Woodmen of the World, 105 Mont. 121, 71 P.2d 898, 905 (1937). In State v. Newman, 66 Mont. 180, 213 P. 805, 807 (1922), the court discussed the requirement of consent:

> [T]he consent, whether in express words, or implied from conduct, must always be given with such an intent on the part of each of the parties that marriage cannot be said to steal upon them unawares. One cannot become married unwittingly or accidently. The consent required by our statute, as well as the statutes of every state, and by the common law, must be seriously given with the deliberate intention that marriage result presently therefrom.

5/ Because of the Board's subsequent holdings, it is irrelevant whether the Blackfeet code prohibited common-law marriages at all times relevant to this matter, or only after 1976. No finding is, therefore, made on this question.

6/ Some jurisdictions, such as West Virginia and Massachusetts, have passed legislation relating to recognition of marriages contracted by their domiciliaries who leave the jurisdiction, enter into a marriage that would be invalid in the jurisdiction of domicile, and then return to that jurisdiction. See, e.g., State v. Austin, 234 S.E.2d 657 (W. Va. 1977); Sweeney v. Kennard, 331 Mass. 542, 120 N.E.2d 910 (1954); Levanosky v. Levanosky, 311 Mass. 638, 42 N.E.2d 561 (1942). See generally Osoinach v. Watkins, 235 Ala. 564, 180 So. 577 (1938).

> The words manifesting the consent may be spoken in the face of the church, or immediately preceding an act of sexual intercourse, * * *. But they must always be spoken by those who know and intend that matrimony in full form shall be the result. Marriage cannot be created piecemeal. It comes instantly into being, or it does not come at all. If anything remains to be done before the relationship is completed in contemplation of the parties themselves, there is no marriage.

Nothing in the three August 1984 common-law marriage cases decided by the Montana Supreme Court and cited to the Board 7/ alters the requirement of consent.

The Board has carefully reviewed the facts of this case including the testimony at the hearings before Judge Fisher. The evidence and testimony is clearly conflicting. In resolving this conflict, deference should be given to Judge Fisher's findings of fact because he had the opportunity to observe the witnesses and judge their credibility. See, e.g., Youngman, supra.

In finding that a common-law marriage had been established, Judge Fisher considered that decedent and appellee lived together over a period of many years, with decedent returning to appellee after separations; that five children were born of this relationship; that appellee used decedent's name from 1948 to the present; and that decedent introduced appellee as his wife in Cut Bank, where they resided. All of this evidence was properly considered and tends to show that a common-law marriage had been established. See Two Bulls, supra.

The evidence, however, can only show a common-law marriage if the parties mutually consented to be married. Judge Fisher made no specific finding as to the intent of the parties, but rather relied on conduct to prove consent.

[2] The Board finds appellee's testimony, previously summarized, particularly convincing as to her true intent. That testimony evidences a continued lack of the present intent on her part to be married that is a necessary prerequisite to the initiation of a common-law marriage under Montana law. In fact, we are unable to find that appellee, after she began living with the decedent, ever really wanted to be regarded as the decedent's wife. We cannot supply that intent. This situation differs from that in Two Bulls where consent was never at issue. There the question was whether the parties had taken sufficient steps after the removal of an impediment to their marriage to change an illicit relationship into a common-law marriage. The Board finds here that the record does not support the finding that decedent and appellee ever expressly or mutually consented to a common-law marriage. 8/

7/ Estate of White, ___ Mont. ___, 41 St. Rep. 1705 (No. 84-164, Aug. 30, 1984), Estate of Sartain, ___ Mont. ___, 41 St. Rep. 1691 (No. 84-15, Aug. 30, 1984); Estate of Murnion, ___ Mont. ___, 41 St. Rep. 1627 (Aug. 28, 1984).

8/ Because of this holding, the Board does not address appellants' remaining arguments.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the August 1, 1983, decision issued by Judge Fisher is reversed.

Anne Poindexter Lewis
Administrative Judge

We concur:

Jerry Muskrat
Administrative Judge

Bernard V. Parrette
Chief Administrative Judge